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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-435

THE CESSNA AIRCRAFT COMPANY, et al.,

vs.

WHITE INDUSTRIES, INC., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, 518 F.2d 213 (June 23, 1975), is reproduced as appendix A below. The unreported opinion of the United States District Court for the Western District of Missouri is reproduced as appendix B below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly held, contrary to decisions in the Second Circuit, that an order certifying a class action can never be appealable as a final "collateral" order under 28 U.S.C. §1291.

2. Whether the instant order should be appealable as a final collateral order because its severely damaging impact will be irremediable by a post-verdict appeal and it can be reviewed without examining the merits of any party's claim.

STATEMENT OF THE CASE

White Industries, Inc., a terminated retail dealer of Cessna Aircraft Company, sued Cessna, its wholesale distributors, and their affiliates and officers, alleging violations of the Robinson-Patman and Sherman Acts. White sought over $280,000,000 on behalf of a purported class of all past and present Cessna retail dealers.

The District Court held that the case could proceed as a class action. Petitioners moved the District Court to certify that decision for immediate review under 28 U.S.C. §1292(b). The District Court stated that prompt review

was desirable but that he would not certify his decision because the Eighth Circuit disapproved of such certifications:

> The Court: I can't predict what the Court of Appeals is going to do, but *I think counsel has a right to seek extraordinary relief and it would probably be valuable* in the context of the whole matter anyway. It might be the equivalent of an appeal, early appeal. (June 5, 1974 pretrial, p. 95. See also *id.* pp. 91-94.)
>
> *I would welcome an expeditious review* of this, and would encourage it. (October 9, 1973 pretrial, p. 69.)
>
> I am not about to certify discretionary appeal [under 28 U.S.C. §1292(b)]. They are not looked on with favor and the people that certify them are not looked on with favor. (October 9, 1973 pretrial, p. 69. Emphasis supplied.)

Petitioners appealed the class certification as a final "collateral order" under the authority of certain Second Circuit cases. The Eighth Circuit dismissed the appeal, expressly rejecting the Second Circuit's view on appealability. (The Eighth Circuit specifically noted that *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308, 1312-13 (2d Cir. 1974) was "contra." App. p. 5a.) The Eighth Circuit established a stringent contrary rule which effectively precludes appeals of class certification orders unless the district judge certifies the ruling under section 1292(b). The court stated its rationale as follows:

> By the very language of the rule [23, Fed.R.Civ.P.], any order rendered by the district court regarding the maintenance of the class action 'may be considered conditional, and may be altered or amended before any decision on the merits.' Fed.R.Civ.P. 23(c)(1) . . . [T]he district court retains the power to terminate the class status if subsequent developments so dictate. (App. p. 5a.)

Since the above rationale applies equally to all Rule 23 (c)(1) decisions, the Eighth Circuit rule forecloses any possibility of appealing class action rulings as final "collateral" orders.[1]

REASONS FOR GRANTING THE WRIT

I.

THERE IS NOW A CLEAR CONFLICT AMONG SIX OF THE CIRCUITS THAT IS RIPE FOR RESOLUTION.

The Second Circuit, the first to confront the problem of the appealability of class certifications, recognized that the massive effect of such rulings on parties and courts could not be remedied by a post-verdict appeal in the ordinary course. Balancing that consideration against the general need to avoid piecemeal review, the Second Circuit has developed a rule allowing appeals of class certifications where those appeals are most needed and least disruptive while denying appeals in other situations. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1007, n.1 (1973), vacated on other

[1] The Court of Appeals also found it "significant to note that the district court in this case refused to certify this appeal under §1292(b)." (App. pp. 6a-7a). As noted, the District Judge had refused certification only because he thought the Eighth Circuit disapproved of certifications. (October 9, 1973 pretrial, p. 69.) The Eighth Circuit denied defendants' petition to mandamus the district court to act under §1292(b) even though: "Mandamus has long been recognized to be available to compel a judge . . . to exercise discretion which he has erroneously considered himself to lack." *United States* v. *Nebbia*, 357 F.2d 303, 305 (2d Cir. 1966). This Petition does not address the mandamus and §1292(b) questions.

grounds, 417 U.S. 156 (1974); *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308, 1312-1313 (1974); *Parkinson* v. *April Industries, Inc.*, ... F.2d ....., CCH Fed. Sec. L. Rptr. ¶95,227 at pp. 98,191-98,196 (1975); *General Motors* v. *City of New York*, 501 F.2d 639, 644-648, 656-661 (1974); *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094, 1097-1101 (1974); *Handwerger* v. *Ginsberg*, ... F.2d ....., CCH Fed. Sec. L. Rptr. ¶95,241 (1975) (summary only published.)[2] See generally Note, "Class Action Certification Orders: An Argument for the Defendant's Right to Appeal," 42 Geo. Wash. L. Rev. 621 (1974) and Redish, "The Pragmatic Approach to Appealability in the Federal Courts," 75 Colum.L.Rev. 89 (1975).

Five other Circuits, including the Eighth Circuit in this case, have refused to follow the Second Circuit's lead. (See App. p. 5a, collecting cases from the Third, Sixth, Seventh and Ninth Circuits.) These Circuits generally agree with the Second Circuit that Rule 23 has created a new and difficult situation with regard to appealability. However, they believe themselves constrained by precedent to apply inflexible rules denying appeal. Now that a majority of the Circuits have ruled on the matter (some several times), the issue is plainly ripe for review and in fact cries out for definitive resolution by this Court. It is unlikely that decisions by other Courts of Appeals will significantly add to the substantial body of matured judicial thought that has already been accumulated in the dozen recent cases on the point.

[2] The first two cases cited allowed appeals; the last four denied appeals. As the rule has finally evolved, the Second Circuit allows appeals of a class certification order which is: "fundamental to the further conduct of the case"; "separable from the merits"; and with a potential to cause harm irreparable by a post-verdict appeal.

Moreover, no issue of federal appellate procedure is more worthy of the attention of this Court than resolution of this conflict among the circuits. The issue affects hundreds of pending cases, including most of the large, complex, and significant civil cases now before the federal courts. Few issues fall so clearly within this Court's supervisory responsibility over federal appeals. Few issues affect so many litigants so significantly. Few issues have such a dramatic impact on the allocation of scarce judicial resources at a time when that scarcity has become a vital national concern.

II.

IMPORTANT PRAGMATIC CONSIDERATIONS IGNORED BY THE EIGHTH CIRCUIT WARRANT A PROMPT APPEAL IN A CASE SUCH AS THIS.

A. The "Gargantuan" Impact of Certain Class Certifications.

A decision allowing a case to proceed as a class action is often the most significant and far-reaching decision in the case. Here that decision converted a simple two-party action into a complicated suit between two dozen defendants and over 1,000 class plaintiffs. Thousands of transactions not germane to the original suit now have been made subject to lengthy discovery proceedings. Because of the requirements of Rule 23, "both parties have to expend much effort and money in notifying members of the class, determining who is in and who has opted out, calculating damages, and the like. . . . These gargantuan actions naturally take up infinitely more of the court's time than most other civil actions." *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308, 1312-1313 (2d Cir. 1974). If a class action is erroneously allowed by a district court, the court will waste untold months of judicial effort and the litigants enormous costs and fees before the time arrives for a post-verdict appeal. Given the large number of class actions currently being filed, great resources can be saved by a procedure permitting prompt appellate correction of improper class action certifications.

To be sure, the savings to parties and district courts, however great, must be balanced against the added burden on courts of appeals. Therein lies the wisdom of the Second Circuit rule which (following opinions of this Court) limits appeals of class certifications to situations where the legal issues being appealed are "separable from the merits." *Parkinson* v. *April Industries, Inc.*, Fed. Sec. L. Rptr. ¶95,-227 at p. 98,195. This limitation confines appeals to a circumscribed but highly significant category of cases where important controlling legal issues can be decided without considering a detailed factual record.

B. Separability of Class Issues from Merits.

This case clearly highlights the necessity of allowing an appeal on class issues separable from the merits of the substantive claims. Ten federal precedents decided in the last three years hold that Robinson-Patman Act cases are inherently unsuitable for class action treatment because of the numerous individual issues necessarily involved.[3] The District Court rejected those precedents and certified this

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[3] *Gulf Wandes Corp.* v. *General Electric*, 1974-1 Trade Cases ¶75,032 (E.D. La.); *J.W.T., Inc.* v. *Seagram*, 1974-1 Trade Cases ¶75,048 (N.D. Ill.); *Shaw* v. *Mobil Oil Corp.*, 60 F.R.D. 566 (D. N.H. 1973); *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah, C.D., 1973); *Hettinger* v. *Glass Specialty Co.*, 1973 Trade Cases ¶74,487 (N.D. Ill.); *Bel Air Markets* v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972); *Lupia* v. *Stella D'Oro Biscuit Co.*, 1974-1 Trade Cases ¶75,046 at pp. 96,687-96,688 (N.D. Ill.); *McMackin* v. *Schwinn Bicycle Co.*,

(footnote continued on following page)

Robinson-Patman case as a class action. The Eighth Circuit could have settled once and for all, for every district court under its supervision, whether Robinson-Patman cases can be brought on a class basis. That highly important ruling could have been made after considering little more than the complaint in the case. In all of the ten precedents cited (in footnote 3), the courts were able to resolve that question of law with one or two pages of legal analysis and without considering the merits of the particular factual claims which gave rise to the class ruling.

Also in this case, petitioners claimed that a terminated dealer such as White could not represent a class of current Cessna dealers because their interests conflict. All ten federal precedents that have considered this issue support petitioners' position.[4] The Eighth Circuit could readily have determined whether it would follow those ten unanimous precedents or would support the District Court in its solitary divergence therefrom. This decision of a significant legal question could have provided needed guidelines to numerous district courts without requiring the Court of Appeals to review the factual record in this particular case. (Each precedent cited in footnote 3 decided the matter with a short general discussion relying little on circumstances peculiar to any individual claim.)

1974-1 Trade Cases ¶75,047 (N.D. Ill.); and *Minnielli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 1973-1 Trade Cases ¶74,591 (S.D. Ohio). The attorneys for plaintiff in this case brought a virtually identical complaint against Piper Aircraft, a competitor of Cessna, in which the class action was disallowed. *Van-S Aviation Corp.* v. *Louisiana Aircraft, Inc.*, (S.D. Fla., No. 73-1871-L-CIV-WM, May 2, 1974).

4 *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 29 (S.D.N.Y. 1972); *Gaines* v. *Budget Rent-A-Car*, 1972 Trade Cases ¶73,860 at p. 91,605 (N.D. Ill.); *Matarazzo* v. *Friendly Ice Cream Corp.*, 18 F.R. Serv. 2d 471, 474-475 (E.D.N.Y. 1974); *Bogosian* v. *Gulf Oil Corporation*, 62 F.R.D. 124, 139 (E.D. Pa. 1973); *J. M. Woodhull, Inc.* v. *Addressograph-Multigraph Corp.*, 62 F.R.D. 58, 63 (S.D. Ohio 1974); *Van Allen* v. *Circle K Corporation*, 58 F.R.D. 562, 564 (C.D. Cal. 1972); *Abercrombie* v. *Lum's, Inc.*, 345 F.Supp. 387 (S.D. Fla. 1972); *DiCostanzo* v. *Hertz Corp.*, 1974-2 Trade Cases ¶75,162 at p. 97,211 (D. Mass.); *Thompson* v. *T.F.I. Companies, Inc.*, 1974-2 Trade Cases ¶75,215 at p. 97,470 (N.D. Ill.); *Seligson* v. *Plum Tree, Inc.*, 61 F.R.D. 343, 345-346 (E.D. Pa. 1973), vacating prior contrary opinion in 55 F.R.D. 259 (1972) on which the District Court relied herein. See App. p. 13a, ¶4(a).

If the Eighth Circuit adopted the majority view on either of the above legal questions in this case, its decision could save the parties and district court great expense and effort. The Eighth Circuit could have economically focused its energies on those two significant legal questions without becoming enmeshed in the details of a long factual record. Under the Second Circuit's pragmatic rule, such considerations would have been of controlling importance. But the Eighth Circuit did not even allow itself to consider these practical aspects of the instant case; the Court held that, because an order certifying a class could be "altered or amended" pursuant to Rule 23(c)(1) at a later time, it could not technically be considered "final." Semantics triumphed over policy considerations.[5]

C. Futility of Post-Verdict Appeal: Robinson-Patman Class Issue.

Justice delayed inevitably becomes justice denied if the instant class certification cannot now be appealed. Petitioners would have to try (and lose) a claim for over $280,-

5 The class certification here was final in every realistic sense. Since April 1972, the parties engaged in extensive discovery, briefing, and argument on the class issue. Numerous lengthy hearings were held. Conclusions of law and findings of fact were proposed, debated, and revised. There is no question that this case will proceed to conclusion as a class action unless this Court intervenes.

000,000 to secure an appeal on the class issue.[6] Under the pressure of such a prospect of financial ruin, the 19 wholesale distributor defendants (who must be held liable if petitioners are held liable) readily agreed with plaintiffs to pay an aggregate of $145,500 to settle the case. The largest contribution made by any of the settling defendants was $28,000, *i.e.*, 1/10,000th of the total damages claimed. Any leverage which an improper class action unjustly exerts on a settling defendant is of course beyond the power of a Court of Appeals to correct.

This pressure on defendants to settle even a weak case for a substantial amount is intensified by the fact that a post-verdict reversal of an improper class certification comes too late to restore to a defendant the fortune he must spend to defend an improperly certified case. By the time of an appeal on the merits, that amount is as irretrievably lost as would have been the cost of notice in the *Eisen* case.[7] Here, for example, the complaint alleges that Cessna's wholesaler-distributors (the settling defendants) illegally sold Cessna planes at retail in competition with Cessna dealers. Plaintiff submitted a list allegedly consisting of over 800 such illegal "retail" sales occurring all over the country. Cessna investigated a few of these and found that the wholesalers in most cases sold to retail dealers rather than to consumers so that there were no violations of the Robinson-Patman Act. Other sales were year-end clearances, end-of-line sales, and other sales of aircraft not of "like grade and quality" to those purchased by Cessna dealers. Claims based on those sales could therefore not be supported.

[6] If petitioners prevail on the merits, it is hard to see how there could be an appeal concerning the propriety of the class determination since petitioners would by then be the beneficiaries of that determination. All damage herein complained of would by then have been irrevocably inflicted and petitioners would have no reason to proceed further.

[7] In *Eisen*, the district court had the power to alter or amend its ruling on costs of notice by awarding costs to defendants at the end of the case under Rule 54(d), F.R.Civ.P. See also Rule 23(d), F.R.Civ.P. This Court did not give any weight to such theoretical possibilities of later modification. In *Eisen*, as here, a subsequent alteration of the order was speculative and in any event could not give defendants practical relief from the order being appealed. The opinion in *Eisen* cannot be reconciled with the Eighth Circuit's rationale in this case.

To determine whether a particular buyer was a retailer or consumer, it was necessary to trace his subsequent use or sale of the aircraft and to examine the nature of his other business operations. To determine the "like grade and quality" issue, it was necessary to consider the nature of each product sold, the time of each sale, and other similar circumstances. Such detailed inquiries for all of the 800 challenged sales (very few of which occurred near Kansas City, where White had his sole place of business) would cost petitioners a staggering amount of unrecoverable dollars.

These costs are multiplied by the very impropriety of the class certification order since that enormously expands the number of transactions arguably relevant to the case. A post-verdict appeal will come too late to give petitioners the benefits of the Rule 23(b)(3) limitations which should have been applied here to avoid crushing defendants by an unmanageable class action where multifarious individual issues so predominate.

D. Futility of Post-Verdict Appeal: Terminated Dealer Class Issue.

Similarly, the claimed conflict of interest here (found to exist by such cases as *Free World Foreign Cars, Inc.* v. *Alfa Romeo,* 55 F.R.D. 26 (S.D.N.Y. 1972) whenever a

terminated dealer like White tries to represent a class of current dealers) will have irreparably inflicted its harm by the time of any verdict. The conflict feared by those cases is created in part by the following facts (*id.* 29):

> It is of no concern to plaintiff whether the defendant can survive economically against the threat of heavy and burdensome expenses involved in resisting a class action. It is a matter of concern to present franchise dealers that defendant remain in business and that they have a continued source of supply of Alfa Romeo automobiles and parts.

Under the ten unanimous recent federal precedents following *Alfa Romeo* (cited in footnote 4), it is the mere maintenance of the case on a class basis which jeopardizes the interests of the current Cessna dealers. After a trial, it is too late to avoid the harm from a conflict of interest which has concerned so many federal courts.[8]

* * *

[8] This conflict of interest is aggravated by the fact that White is a potential competitor of those that it seeks to represent. The practical conflict of interest created by such a situation has generally been held to be a further reason for denying class action treatment. *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968); *William Goldman Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 49 F.R.D. 35, 40-41 (E.D. Pa. 1969); *DiCostanzo* v. *Hertz Corp.*, 1974-2 Trade Cases ¶75,162 at p. 97,211 (D. Mass.) White is a former aircraft dealer still in the aircraft business. As a part of this lawsuit, White must go through the files of the current Cessna dealers (who are included in the certified class) and ascertain their prices, profits, problems with Cessna, other legal problems, sales techniques, and general business practices. With such information, White could obviously go into business for any other aircraft manufacturer and compete very effectively with those Cessna dealers it is now claiming to represent. It will be able to derogate Cessna aircraft and retailers with great detail and credibility when competing for potential customers. It will know just what prices to charge and what sales areas to invade. All of this will be irreversibly effectuated if White is permitted to continue his representation of current Cessna dealers.

We do not ask this Court to decide whether the majority view on the merits of the above points is correct. (The Eighth Circuit did not reach those issues.) We merely urge that claims of right important enough to have been upheld by numerous recent federal cases will be irretrievably lost unless an appeal is allowed at this time. The Second Circuit rule will provide defendants a meaningful day in court by allowing this appeal without embroiling the Court of Appeals in the merits of the factual claims of particular parties. However, even if the Second Circuit rule is not to be adopted, the time is now ripe to consider the instant significant recurring question of federal appellate procedure that has prompted a dozen inconsistent Court of Appeals decisions in six different Circuits in the last five years.

CONCLUSION

For these reasons, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1563

In Re Cessna Aircraft Distributorship
Antitrust Litigation

White Industries, Inc.,

Appellee,

vs.

The Cessna Aircraft Company, Cessna Finance Corporation, Pennant Aviation, Inc., Dwane Wallace, Delbert L. Roskam, Robert P. Bauer, Edward B. Chase and Harold Gorrell,

Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 6, 1975
Filed: June 23, 1975

Before JOHNSEN, *Senior Circuit Judge,* STEPHENSON and WEBSTER, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

This is an appeal from the district court's[1] determination pursuant to Fed. R. Civ. P. 23(b)(3) that this action

[1] The Honorable William H. Becker, Chief Judge, United States District Court, Western District of Missouri.

against Cessna Aircraft[2] proceed as a class action with appellee White Industries, Inc. serving as class representative. The critical issue on this appeal is whether the district court's interlocutory order granting class standing is appealable. We hold that it is not and dismiss this appeal.

Appellee White Industries, Inc., a "full line" dealer of Cessna Aircraft in 1968 and 1969, and Eugene Ingram, a Cessna dealer at various levels during the years of 1968-74, brought suit against Cessna in federal district courts in both Missouri and Kansas alleging price discrimination in violation of §§ 2(a) and 2(f) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and 13(f) (1970), and a conspiracy to violate § 1 of the Sherman Act, 15 U.S.C. § 1 (1970). Both charges arose out of Cessna's nationwide marketing and pricing system. They sought $94,000,000 in damages before trebling.

Following the completion of discovery on the class action issue in the Western District of Missouri, the Judicial Panel on Multidistrict Litigation transferred the Kansas action to that court for pretrial processing. On June 5, 1974, following two years of conferences and deliberations, the court filed its conclusions of law and findings of fact which included an order that the litigation proceed as a class action with White Industries, Inc. serving as representative for two national classes: a "litigating class" consisting of Cessna dealers during the period from April 14, 1968 to June 5, 1974; and a "settlement class" consisting

[2] In addition to Cessna Aircraft Company, the appellants include Cessna Finance Corporation, Pennant Aviation, Inc., Dwane Wallace, Delbert L. Roskam, Robert P. Bauer, Edward B. Chase, and Harold Gorrell. In this opinion we will refer to all appellants as "Cessna."

of Cessna dealers from the period of January 1, 1960 to April 14, 1968, the latter being subject to the statute of limitations on their claims unless fraudulent concealment could be shown. This appeal followed.

Cessna's appeal asks us to overturn the district court's determination that this action should proceed as a national class action. We do not reach the merits of that decision by the lower court. After this appeal was filed, White Industries, Inc. lodged a motion to dismiss the appeal, contending that it was premature and not a "final decision" under 28 U.S.C. § 1291. We agree. In addition, we deny appellant Cessna's alternative request that we issue a writ of mandamus to the district court either to compel certification of the appeal under § 1292(b) or to reverse the class action order.

Generally, appealability as a "final decision" under 28 U.S.C. § 1291 is limited to final judgments reached after a trial on the merits of an action. However, as the Supreme Court stated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), there exists a

> small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

See also Baxter v. *United Forest Products Co.*, 406 F.2d 1120, 1123 (8th Cir.), *cert. denied*, 394 U.S. 1018 (1969).

The "collateral order" doctrine from *Cohen* was recently reaffirmed by the Supreme Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court stated that a

determination of whether the order before it was "final" for purposes of § 1291 required

> some evaluation of the competing considerations underlying all questions of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted).

Id. at 171. In holding the order in *Eisen* appealable, the Court emphasized that it "settled conclusively" a contention regarding applicable law and that it "involved a collateral matter unrelated to the merits of petitioner's claim" which "could not be reviewed effectively on appeal from the final judgment." *Id.* at 171-72.

In the instant case, appellant Cessna initially argues that all orders granting class action status to cases involving substantial claims for monetary damages should be appealable under § 1291. However, the *Eisen* decision appears to reject such an across-the-board determination of appealability. *See* 417 U.S. at 170. Alternatively, Cessna contends that the particular facts of this case require that we entertain this appeal in accordance with the dictates of the *Cohen* doctrine. Our examination of the record in this case and the nature of an order granting class action status under Rule 23 convinces us that the order here is not sufficiently "final" or "collateral" to justify appellate review at this time.

Under Rule 23 the district court is given broad discretion to determine the maintainability and the conduct of class actions. *See Wilcox* v. *Commerce Bank*, 474 F.2d 336, 344 (10th Cir. 1973); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969). By the very language of the rule, any order

rendered by the district court regarding the maintenance of the class action "may be considered conditional, and may be altered or amended before any decision on the merits." Fed. R. Civ. P. 23(c)(1). Thus, in discharging its obligation to assure the "fair and efficient adjudication of the controversy," the district court retains the power to establish sub-classes or to terminate the class status if subsequent developments so dictate. *See Wilcox, supra*, 474 F.2d at 344. The district court in this case specifically retained these powers in the order which granted the class status. Given these facts, it is apparent that the order here cannot be considered "final" in the manner indicated by the *Cohen* and *Eisen* decisions. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 752-56 (3d Cir. 1974); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14, 15-16 (7th Cir. 1972); *Walsh* v. *City of Detroit*, 412 F.2d 226, 227 (6th Cir. 1969); *Fabrikant* v. *Stewart*, 64 F.R.D. 443 (S.D. Cal. 1974), *appeal dismissed*, ... F.2d ..... (9th Cir., filed May 19, 1975). *Contra Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308, 1312-13 (2d Cir. 1974); *but see General Motors* v. *City of New York*, 501 F.2d 639, 644-48 (2d Cir. 1974).

Nor do we feel that the issue here is so divorced from the merits that effective review cannot be had after a final judgment is entered. Cessna's contentions regarding the propriety of the district court's order focus on the ability of White Industries to serve as the class representative. Cessna argues that White Industries, Inc. as a former dealer has a conflict of interest with present dealers that makes it an unfit representative. In addition, Cessna argues that the claims of price discrimination in a Robinson-Patman Act case are individualized as to each dealer and cannot be the subject of class action treatment.

Obviously, if this court were to entertain these issues, it would be plunging headlong into the merits of the case. Each of these issues can be raised and fully ventilated on appeal following a final judgment. Consideration at this time would serve no justifiable judicial purpose. *See Thill Securities Corp., supra,* 469 F.2d at 15-16; *Walsh, supra,* 412 F.2d at 227.

In so holding that the order in this case is interlocutory and not appealable under § 1291, we are not suggesting that early appellate review of such orders is necessarily foreclosed in every case. For example, the district court could have certified this appeal under either § 1292(b) or Fed. R. Civ. P. 54(b) if it felt that the gravity of the class action certification issue required an expedited hearing by this court.[3] As recently stated by the Third Circuit in *Samuel* v. *University of Pittsburgh,* 506 F.2d 355, 361 (3d Cir. 1974), by using these alternative means of review "the knowledge bred of the district court's proximity to the case can be brought to bear on the question of the propriety of immediate review." *See also Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 753-56 (3d Cir. 1974); *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1974).[4] It is

[3] We do not at this time decide which of these provisions is the preferable means of certifying a class action order. *See Samuel* v. *University of Pittsburgh,* 506 F.2d 355, 360 n.14 (3d Cir. 1974). Howver, the order by the district court in the instant case would not seem to lend itself to certification under Rule 54(b). *See generally 6 J. Moore, Federal Practice* ¶¶ 54.27[2]-[3]; 54.30 [2.—2]; 54.33-.34 (2d ed. 1974).

[4] Even if this appeal had been certified under § 1292(b), this court in its discretion could have declined to accept the certification. *See Control Data Corp.* v. *International Business Machines Corp.,* 421 F.2d 323, 325 (8th Cir. 1970). We offer no opinion as to what our decision would have been in the instant case.

significant to note that the district court in this case refused to certify this appeal under § 1292(b).

Finally, the remedy of mandamus remains available in those extraordinary instances when the district court, in granting the maintenance of a class action, has exceeded "the sphere of its discretionary power." *Will* v. *United States,* 389 U.S. 90, 104. *See Katz* v. *Carte Blanche Corp., supra,* 496 F.2d at 752; *Hackett* v. *General Host Corp., supra,* 455 F.2d at 624. *See also Stein* v. *Collinson,* 499 F. 2d 91, 95 (8th Cir. 1974); *Gialde* v. *Time, Inc.,* 480 F.2d 1295, 1302 (8th Cir. 1973); *Pfizer, Inc.* v. *Lord,* 456 F.2d 545, 547 (8th Cir. 1972).

In the instant case, appellant Cessna has filed a mandamus petition as an alternative means of obtaining review by this court. The petition requests that we either direct the district court to certify the class action orders for appeal under § 1292(b) or simply reverse the lower court's granting of class action status. Nothing in the record or briefs in this case convinces us that such extraordinary relief is required. As stated by the Supreme Court in *Will,* the writ of mandamus is one of the "most potent weapons in the judicial arsenal." 389 U.S. at 107. Where, as here, there is absolutely no showing that the district court abused its judicial power in granting the class action, this drastic action cannot be invoked.

Appeal dismissed.

A true copy.

Attest:

Clerk, U. S. Court Of Appeals, Eighth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Docket No. 123

IN RE CESSNA AIRCRAFT DISTRIBUTORSHIP
ANTITRUST LITIGATION

CONCLUSIONS OF LAW
CONCERNING THE CLASS ACTION ISSUE

On Tuesday, January 9, 1973, an evidentiary hearing on the class action question in Case No. 20245-4 was held before the Honorable Elmo B. Hunter of this district. Thereafter, Judge Hunter recused himself from further participation in the case because of a potential conflict of interest arising from his membership on the governing board of the School of the Ozarks, an authorized Cessna dealer. The matter was assigned to this Court by order of the Judicial Panel on Multidistrict Litigation which also transferred for coordinated or consolidated pretrial processing a related case from the District of Kansas.

Following a pretrial conference on June 8, 1973, an order was entered directing the parties in the transferred Kansas case "To Show Cause Why the Record on the Class Action Question Heretofore Made Should Not Be Made Applicable to the Parties in the Transferred Action,

and to Show Cause Why the Court Should Not Determine the Class Question on the Basis of the Hearing and Record Heretofore Made."

None of the parties to the transferred Kansas case having shown or suggested any cause for any additional evidentiary hearing on the class issue, and none suggesting any cause why the record heretofore made should not be applicable to them.

Now Therefore, the following conclusions of law are hereby made on the basis of the pleadings of this action and the record of the evidentiary hearing heretofore made:

CONCLUSIONS OF LAW

Impracticability of Joinder—Rule 23 (a) (1)

1. The class is so numerous that joinder of all members is impracticable. With the current authorized Cessna dealers, Zone and Independent, numbering approximately 600, and the Cessna dealers operating during the period involved in this litigation exceeding 1,000, the numerosity requirement of Rule 23 (a) (1) is clearly met. *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967). Additionally, the dispersion of the Cessna dealers throughout the United States compels, as a matter of common sense, the conclusion that joinder of all class members is impracticable.

Common Question of Law or Fact—Rule 23 (a) (2)

2. There are questions of law or fact common to the class. The facts which plaintiff White Industries, Inc. must

establish in order to demonstrate the alleged violations of the antitrust laws are the same facts which any other Cessna dealer would have to establish if it sought relief individually. With regard to the Robinson-Patman claims White Industries, Inc. must prove each and every jurisdictional element of the Act and the anticompetitive efforts flowing from the discrimination allegedly resulting from the dual pricing system of The Cessna Aircraft Company. The same proof would be required of any other Cessna dealer who chose to pursue such claim. Additionally, the allegation of a common conspiracy to effectuate and to maintain the allegedly discriminatory dual pricing system is a matter requiring like proof whether the matter is pursued by White Industries, Inc. or by any other Cessna dealer. These and other areas of commonality, as reflected in the Findings of Fact, demonstrate that element (a) (2) of Rule 23 is met in this action. *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968); *In Re Ampicillin Antitrust Litigation,* 55 F.R.D. 269 (D.D.C. 1972); 6 A.L.R. Fed. 19, 34-37.

Typicalness of Plaintiff's Claims—Rule 23 (a) (3)

3 (a). The claims of White Industries, Inc. are typical of the claims of the class. In view of the fact that White Industries, Inc. and the other Cessna Dealers, Zone and Independent, operated pursuant to the Cessna Policy and Procedure Manual, and particularly because they all paid the allegedly discriminatory "dealer net" price which is the subject of this litigation, the claims of White Industries, Inc. are typical of the claims of all other Cessna dealers.

3 (b). Any differences which exist between White Industries, Inc. and the Independent Distributor Dealers are

not such as to make the position of White Industries, Inc., in this litigation, atypical of the position of the Independent Distributor Dealers.

3 (c). In particular, the fact that White Industries, Inc. and the other Zone dealers purchase directly from Cessna while the Independent Distributor Dealers purchase through the Independent Contracted Distributors and thus indirectly from Cessna is a difference without effect in the context of this litigation. The Independent Distributor Dealers are "purchasers" of The Cessna Aircraft Company within the meaning of Section 2 (a) of the Robinson-Patman Act just as the zone dealers are. This is the clear teaching of *Federal Trade Commission* v. *Fred Meyer, Inc.,* 390 U.S. 341 (1968) and *Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969). See also in this connection *Checker Motors Corp.* v. *Chrysler Corp.,* 283 F. Supp. 876, affd. 405 F. 2d 319 (2d Cir. 1969), cert. den. 394 U.S. 999 (1969) where the District Court observed, at 887:

> The Supreme Court has recently given added vitality to the [indirect purchaser] doctrine by eliminating the direct dealing and control requirements with respect to the disfavored "indirect purchaser" where the defendant has engaged in direct sales to the favored purchaser. [Citing *FTC* v. *Fred Meyer, Inc.,* 390 U.S. 341 (1968)]

3 (d). The difference in the types of planes which Cessna dealers are authorized to purchase and resell is not such a difference as will make the claims of White Industries, Inc. atypical of the claims of other Cessna dealers. With regard to the "typicalness" issue the Courts have consistently held that there need not be a complete identity between the representative plaintiffs and the class they seek to represent, *Eisen* v. *Carlisle & Jacquelin, supra;*

Illinois v. *Harper & Row Publishers, Inc., supra; Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *Siegel* v. *Realty Equities Corp. of New York*, 54 F.R.D. 420 (S.D. N.Y. 1972). On the issue of whether there was an unlawful discrimination in price between the Cessna dealers and the Independent Distributors, the position and interest of White Industries, Inc. coincides with the position and interest of the members of the class it seeks to represent.

3 (e). The claims of White Industries, Inc. are not antagonistic to the claims of the members of the class. *Thomas* v. *Clarke*, 54 F.R.D. 245 (D. Minn. 1971).

3 (f). The fact that White Industries, Inc. was a business competitor of the members of the class it seeks to represent is not a basis for its disqualification as class representative under the circumstances of this case. The court in *First American Corp.* v. *Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970) correctly stated the governing rule: "Such antagonism as would defeat the representation of a class *must be as to the subject matter of the suit.*" (emphasis supplied). See also in this regard *Sunrise Toyota Ltd.* v. *Toyota Motor Company*, 55 F.R.D. 519 (S.D. N.Y. 1972) where the court rejected a contention that one franchised Toyota dealer could not represent other Toyota dealers in his area in an antitrust action against the manufacturer. That court stated, at 533:

> Although on one level all members of the plaintiff class are competitors in the sale of Toyota vehicles within the region, nonetheless, as to the class claims their interests are alike. There is no ground for fear that plaintiff's interests are antagonistic to those of others in the class *as to the subject matter of the case.* (emphasis supplied)

See also *In Re Ampicillin Antitrust Litigation, supra,* where one of the classes authorized was composed of all wholesale/retail druggists in the United States.

Adequacy of Representation—Rule 23 (a) (4)

4 (a). White Industries, Inc. will fairly and adequately represent the class. White Industries, Inc. has rights in the cause of action which is asserted on behalf of the class and allegedly has sustained injury in a manner similar to that of the other members of the class. It therefore satisfies the prerequisite that it be a member of the class it seeks to represent, *Seligson* v. *Plum Tree, Inc.*, 55 F.R.D. 259 (E.D. Pa. 1972).

4 (b). White Industries, Inc. has a financial stake in the successful prosecution of this litigation such that the Court is assured "he will put up a vigorous fight." *Thomas* v. *Clarke, supra,* at 251.

4 (c). Counsel for White Industries, Inc. are familiar with both the antitrust laws applicable to this litigation and the peculiarities of the aviation industry and will provide adequate legal representation for the class representative. *Wolfson* v. *Solomon*, 54 F.R.D. 584 (S.D. N.Y. 1972).

Rule 23 (b) (3) Class

5 (a). This litigation is classifiable as a class action under Rule 23 (b) (3).

5 (b). The questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class. The conspiracy alleged is stated to be operative against all Cessna dealers as is the allegedly discriminatory dual pricing system. Proof of the existence of the conspiracy and the illegality, if any, of the dual pricing system dwarf the

other issues in the case. By the vehicle of this single piece of litigation the basic liability of defendants, if any, can be established once for all. Even on the matter of damages the "direct damage" rule of the Eighth Circuit leads to the conclusion that common questions predominate over questions affecting only individual members of the class. *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); *Ag-Chem Equipment Co., Inc.* v. *Hahn, Inc.*, 350 F. Supp. 1044 (D. Minn. 1972). See also in this regard the opinion of Senior Judge Johnson of the Eighth Circuit, sitting by assignment, in *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969); and *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947); 15 Antitrust Bul. 153 (1970); 31 Md. L. Rev. (1971).

5 (c). The class action is superior to other available methods for the fair and efficient adjudication of the controversy. Joinder having already been rejected as impracticable, the Court has undertaken to make a realistic evaluation of "other available methods" and has found them wanting. *Manual For Complex Litigation* § 1.43. Separate suits by numerous plaintiffs, particularly on the matters of conspiracy and the alleged illegality of the dual pricing system, would certainly be inconsistent with a concept of efficient adjudication of controversies. And as was noted above this is a national pricing system which is involved and no method of adjudication should be adopted which is likely to lead to divergent results. Nor is intervention an appropriate alternative in light of the large number of Cessna dealers and their dispersal across the United States.

Specific Considerations—Rule 23 (b) (3) (A)

5 (d). In particular, the Court finds that there is no compelling interest of members of the class in individually

controlling prosecution of separate actions. The Court is aware of no action other than the litigation pending before it challenging the conspiracy and allegedly unlawful dual pricing system. Because of the undoubted expense which will be involved in pursuing this complex case and the lack of any expressed interest on the part of class members elsewhere to date, there appears to be no reason to decline the class request on the basis on consideration (b) (3) (A).

Specific Considerations—Rule 23 (b) (3) (B)

5 (e). Since the only litigation challenging the conspiracy and allegedly illegal dual pricing system of which the Court is aware, is the litigation pending before this Court, "the extent and nature of any litigation concerning the controversy already commenced by members of the class" is not a matter bearing upon the appropriateness of class certification in this case.

Specific Considerations—Rule 23 (b) (3) (C)

5 (f). It is desirable and appropriate to concentrate the litigation of the claims in this particular forum. This forum is not only the forum most familiar with the litigation, but it is also centrally located and near the bulk of the records which will ultimately need to be produced. Additionally, the Judicial Panel on Multidistrict Litigation has, without objection from any party, selected this forum as the transferee court under 28 U.S.C. 1407 for the only other Cessna Distributorship case presently on file.

Specific Considerations—Rule 23 (b) (3) (D)

5 (g). Difficulties likely to be encountered in the management of this litigation as a class action are controllable. The members of the class are identifiable. The transactions giving rise to compensable damages, if any, are identifi-

able. Plaintiff has advised the Court of its ability and willingness to pay for any and all notices to the class which the Court deems desirable. As mentioned above, even on the matter of damages the rule of the Eighth Circuit permits a calculation which commends itself to class treatment.

5 (h). The broad discretionary powers granted to the Court by Rule 23 (c) (4) and 23 (d) will enable the Court successfully to solve any novel administrative problems which may arise in the course of this litigation.

5 (i). At this stage of the litigation while the question of liability yet remains to be resolved it is the Court's conclusion that a single national class composed of all Cessna dealers in the United States, Zone and Independent, is appropriate and is the most desirable class designation that can be made for the fair and efficient adjudication of the controversy.

5 (j). The Court has authority to create subclasses and to make such other orders modifying or altering the membership of the class as appears appropriate and will exercise that authority as may be necessary to insure the fair and efficient adjudication of this controversy.

5 (k). In particular, the Court will consider the desirability of forming subclasses on the matter of damages should the class prevail on the liability question.

5 (l). The availability and applicability of the "inference technique" of *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 45-47 (1948), used in buyer-level injury cases such as the pending litigation, leads to the conclusion that there is no reason to fear significant management difficulties in the area of "fact of injury" in this litigation. See also *United Biscuit Co.* v. *FTC*, 350 F.2d 615 (7th Cir. 1965), cert. den. 383 U.S. 926 (1966).

5 (m). Although some evidence of fraudulent concealment has been disclosed as a result of the special issue discovery now completed, and Cessna itself acknowledged that "a distributor could easily hide from Cessna the fact that he was selling at retail," nevertheless, because no formal discovery on the question of fraudulent concealment has yet been authorized, the Court reaches no decision at this time concerning the appropriateness of enlarging the class to include the pre-1968 period. Such decision should await the completion of discovery on the fraudulent concealment issue and opportunity on the part of all parties to make such presentation to the Court on that issue as they deem appropriate.

6. The Findings of Fact and Conclusions of Law made in determining that this action shall proceed as a class action are made for that purpose and as a matter of law are not binding on any party in the subsequent determination of any or all issues in the merits including but not limited to manner of proof of damages if any, *Eisen* v. *Carlisle & Jacquelin* 1974; *Miller* v. *Mackey International*, 452 F.2d 424 (CA 5, 1971).

Now Therefore, in light of the findings of fact heretofore made and conclusions of law recited herein.

It Is Ordered that this litigation proceed as a class action with White Industries, Inc. serving as representative for a single national class composed of all authorized Cessna dealers, Zone and Independent, in the United States for the period of April 14, 1968 through June 5, 1974.

Dated this 5 day of June, 1974.

.....

Chief Judge

75-435

Supreme Court, U. S.
FILED
OCT 17 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. [redacted]

IN RE CESSNA AIRCRAFT DISTRIBUTORSHIP ANTITRUST LITIGATION

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1745

IN RE CESSNA AIRCRAFT DISTRIBUTORSHIP ANTITRUST LITIGATION

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Eighth Circuit was correct in holding in accordance with the *Eisen IV* decision of this Court and the current position of the other Circuits that appealability under 28 U.S.C. 1291 of class certification is appropriate only if the requirements of the final order rule, as modified by the *Cohen* "collateral order" doctrine, are met?

2. Whether the Eighth Circuit was correct in applying the final judgment rule, as modified by the "collateral order" doctrine, rather than ruling as a matter of law that Robinson-Patman claims cannot be processed as class actions and that a former dealer can never be a class representative for a class including present dealers?

STATEMENT OF THE CASE

The District Court, following a hearing and numerous pre-trial conferences, directed that this action proceed as a class action with White Industries, Inc. serving as the class representative. It expressly retained, in accordance with the policy expressed in Rule 23, F.R.Civ.P., the authority to modify or alter the class action order. Petitioners sought early review of the class determination pursuant to 28 U.S.C. 1291. The Court of Appeals for the Eighth Circuit applied the final order rule, expressly evaluating the proposed appeal in light of the *Cohen* "collateral order" doctrine. In doing so it relied upon this Court's *Eisen IV* decision and the current authorities from all of the Circuits which had then passed upon the question of appealability of class certifications. It concluded that "the order here is not sufficiently 'final' or 'collateral' to justify appellate review at this time," *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215, and dismissed the appeal.

It is from that dismissal that petitioners now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among the Circuits

There is no conflict among the Circuits regarding the appealability of class certifications under 28 U.S.C. 1291. Particularly since this Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*Eisen IV*), the Circuits have demonstrated a marked uniformity in dealing

with attempted appeals from class certifications. They have uniformly recognized and placed a renewed emphasis on the policies of finality. *General Motors* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Parkinson* v. *April Industries, Inc.*, CCH Fed. Sec. L. Rptr. par. 95,227 (2d Cir. 1975); *Handwerger* v. *Ginsberg*, CCH Fed. Sec. L. Rptr. par. 95,241 (summary only published) (2d Cir. 1975); *Fabrikant* v. *Stewart*, 64 F.R.D. 443 (S.D.Cal. 1974), appeal dismissed, ... F.2d ..... (9th Cir., filed May 19, 1975); *Seiffer* v. *Topsy's International, Inc.*, ... F.2d ..... (10th Cir., filed July 28, 1975); and the instant case, *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir. 1975).

While emphasizing the policies of finality, they have acknowledged the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) which this court reaffirmed in the context of class action issues in *Eisen IV*, *supra*, and have evaluated efforts to appeal class certifications in accordance with that doctrine.

Even prior to this Court's *Eisen IV* decision the Circuits which had passed on this question, with the exception of the Second Circuit, had uniformly applied the final order rule as modified by the *Cohen* collateral order doctrine. *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974), relying upon *Hackett* v. *General Host*, 455 F.2d 618 (3rd Cir. 1972); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969).

Petitioners' assertion of conflict among the Circuits is not and cannot be based upon the current authorities within the Circuits, for as to them there is no conflict. Rather, petitioners would have this Court believe that the pre-*Eisen IV* views expressed in two cases from the Second Circuit, *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d

1005 (2d Cir. 1973), and *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308 (2d Cir. 1974), represent the current position of that Circuit and postulate their perceived conflict upon that proposition. This Court, of course, dealt with the question of appealability raised by the *Eisen* case and resolved it on the basis of the finality policy and the collateral order doctrine of *Cohen, supra.* As to the *Herbst* decision, the Second Circuit itself, in *Parkinson, supra,* note 6, pp. 98,194-98,195, has appropriately observed that that decision, expressing a broad rule favoring appealability, essentially represented the view of a single judge of the Circuit, Judge Lumbard, stating:

> Two other members of the panel, in separate concurrences, indicated that each of them had strong reservations as to interlocutory appealability, but concurred in the result because of the then sub judice status of Eisen III before the Supreme Court.

Further, at p. 98,196, note 8, the *Parkinson* court observed:

> The continuing precedential validity of Herbst in view of the decisions in Kohn and General Motors is an open question which is not now before us.

Herbst has been relegated, by the Second Circuit itself, to the "short evolutionary period" through which that Court passed before setting forth its "three-pronged" test of appealability, *Parkinson, supra,* at 98,194-98,195.

The post-*Eisen IV* position of the Second Circuit is clearly that expressed in *General Motors* v. *City of New York, supra,* and *Parkinson* v. *April Industries, Inc., supra.* The three-pronged test, enunciated in *General Motors, supra,* and applied and commented upon in *Parkinson, supra,* is entirely consistent with this Court's *Eisen IV* decision

and with the decisions of the other Circuits. A reading of *Parkinson, supra,* at 98,196 leaves no doubt:

> *Kohn* and *General Motors* in their application of the three pronged test mark a renewed emphasis on the policies of finality. As *General Motors* recognized, this result is encouraged, at least inferentially, by the Supreme Court's treatment of the jurisdictional questions presented in *Eisen* ....

Nor is the Second Circuit's formulation of the three-pronged rule a new exception to the policy of finality. *Parkinson, supra,* at 98,196, dispels any such notion:

> The Court, while creating the three-pronged test, has interpreted its elements most restrictively, an approach upon analysis which we find to be appropriate in light of the sound policies of finality. Indeed, the three-pronged test, narrowly interpreted, does not mark a departure from the final judgment rule, nor does it create a new exception to that general rule, but rather, it is a corollary to the collateral order doctrine tailored to the particular circumstances of class litigation.

That the current position of the Second Circuit is not in conflict with that of the other Circuits is underscored by the fact that the other Circuits have cited in support of their own decisions on class certification appealability the post-*Eisen IV General Motors* case. *In Re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213 (8th Cir. 1975); *Fabrikant* v. *Stewart,* 64 F.R.D. 443 (S.D. Cal. 1974), appeal dismissed, ____ F.2d ____ (9th Cir., filed May 19, 1975); *Seiffer* v. *Topsy's International, Inc.,* ..... F.2d ..... (10th Cir., filed July 28, 1975).

It is clear that the "conflict" asserted by petitioners is only an imagined one and that the Circuits, particularly

since *Eisen IV*, have matched step in their treatment of attempted 1291 appeals of class certifications. There is, therefore, no need to resolve any conflict among the Circuits on this point.

II.

The Eighth Circuit Did Not Ignore Important Pragmatic Considerations

A. The Asserted " 'Gargantuan' Impact."

Petitioners' argument under the heading of " 'gargantuan impact" amounts to nothing more than an assertion that all certifications of big class actions should be immediately and automatically appealable under 28 U.S.C. 1291. While reciting that this early appellate review would be limited "to situations where the legal issues being appealed are 'separable from the merits,' " petitioners fail to disclose how the factor of size permits this separation. Further, it cannot be contended in good faith that the Eighth Circuit ignored this assertion. It expressly examined the record on this point in accordance with the *Cohen* doctrine, the heart of which is reviewability for an issue "separable from the merits," and concluded, at 215:

> Our examination of the record in this case and the nature of an order granting class action status under Rule 23 convinces us that the order here is not sufficiently "final" or "collateral" to justify appellate review at this time.

B. The Asserted "Separability of Class Issues From Merits."

Under this heading petitioners assert two things: (1) That the Eighth Circuit should have ruled as a matter of law that no Robinson-Patman Act cases can be brought

as class actions; and (2) That as a matter of law a former dealer can never act as a class representative for present dealers.

With regard to the first assertion, petitioners' statement, at page 7 of their brief, that "[t]en federal precedents decided in the last three years *hold* that Robinson-Patman Act cases are *inherently unsuitable for class action treatment* because of the numerous individual issues necessarily involved" is patently false. (Emphasis supplied). Of its ten cited cases, one does not even deal with the Robinson-Patman Act, *McMackin v. Schwinn Bicycle Co.*, 1974-1 CCH Trade Cases, par. 75,047 (N.D. Ill. 1974). And none of the other nine even so much as hint, much less "hold" that there is anything peculiar about a Robinson-Patman claim that makes class treatment unsuitable. Rather, each turns on an evaluation of the particular facts presented. Two of those cases expressly acknowledge the Tenth Circuit's *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791 (10th Cir. 1970), which found the facts of the Robinson-Patman claim there alleged to be appropriate for class treatment, *Albertsons, Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), and *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972).

Only by now asserting that the Eighth Circuit should have ruled out class treatment of Robinson-Patman cases as a matter of law can petitioners avoid the dilemma of diving into the merits on their desired early appeal. However, such a ruling is not only unsupported by any authority, it is directly contrary to the standards of Rule 23 and to the policy expressed in The Advisory Committee's Notes, 39 F.R.D. 73, 102 (1966). The Advisory Committee's Notes, at 102 expressly suggest the use of class action treatment in price discrimination cases. The Eighth Circuit properly refused to rule as a matter of law that

Robinson-Patman cases can never be processed as class actions. Once that position is taken, there can be no dispute that if the Eighth Circuit had entertained the question whether this particular Robinson-Patman case was appropriate for class processing "it would be plunging headlong into the merits of the case," *In Re Cessna Aircraft Distributorship Antitrust Litigation, supra,* at 216.

With regard to the second assertion, even the authorities upon which petitioners rely do not establish the hard-and-fast rule petitioners suggest. Whether a representative party will fairly and adequately represent the class is a factual question. Determination of this question must be based upon evidence in the record and not upon mere speculation; and this principle was recognized by both the District Court and Court of Appeals in this case. *McMackin v. Schwinn Bicycle Co.*, 1974-2 CCH Trade Cases, par. 75,047 (N.D. Ill. 1974), at page 96,690, one of the authorities relied upon by petitioners, states:

> It should be emphasized that the Court does not adopt the notion that a former franchisee may never represent a class that includes present franchisees. Such a *per se* rule would be counter to the standards and purpose of Rule 23. . . . Each case must be considered on its own facts.

This same principle is enunciated in 7 Wright & Miller, Federal Practice and Procedure, Civil: § 1765 at 622: ". . . what constitutes adequate representation is a question of fact that depends on the circumstances of each case."

As to this factual issue the Eighth Circuit appropriately ruled that it was not so divorced from the merits that effective review could not be had after a final judgment is entered, and further, that to entertain it now would plunge the reviewing court into the merits.

Neither of the two issues asserted is capable of determination as a matter of law. And neither can be factually determined without delving deeply into the merits, as petitioners' Eighth Circuit briefs, which dealt almost exclusively with the merits, so aptly illustrate.

C. The Asserted "Futility of Post-Verdict Appeal: Robinson-Patman Class Issue."

Under this heading petitioners phrase, albeit in somewhat different terms, merely another pitch for instant appealability under 28 U.S.C. 1291 of class certifications in all big class cases. The lack of support for this proposition has already been demonstrated. However, petitioners do not stop there. Apparently unable to resist getting into the merits they parade out their merit arguments from the Eighth Circuit briefs and suggest manageability problems and increased costs which will result from them. These are the very matters which defy effective appellate review without full development of the record by trial on the merits. For the Eight Circuit to have passed upon the propriety of the class determination on the basis of petitioners' merit contentions would have been to engage in pure speculation and conjecture. It appropriately resisted that invitation.

D. The Asserted "Futility of Post-Verdict Appeal: Terminated Dealer Class Issue."

Under this heading petitioners restate their position that a former dealer should never be permitted to act as class representative for a class which includes present dealers. They contend that the mere maintenance of the class action with White Industries as the class representative jeopardizes the interests of the current Cessna dealers. The factual record developed before the District Court

refutes this contention, and the District Court made the express finding on the basis of that record that White Industries will fairly and adequately represent the class, including the current dealers. Further, the Court of Appeals when presented with this same contention stated, at 216:

> Obviously, if this court were to entertain these issues, it would be plunging headlong into the merits of the case. Each of these issues can be raised and fully ventilated on appeal following a final judgment. Consideration at this time would serve no justifiable judicial purpose.

If every significant fact finding decision by a District Court were immediately reviewable under 28 U.S.C. 1291 the salutary final judgment rule would be a dead letter.

CONCLUSION

There is no conflict among the Circuits. The opinion of the court below is correct. The petition for a writ of certiorari should be denied.

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IN THE

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No. [redacted]

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vs.

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REPLY SUPPORTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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Respondents make two assertions that require a brief reply.

I.

THE COURTS OF APPEALS HAVE HELD THAT THEIR DECISIONS ARE IN CONFLICT.

Respondents assert that there is no conflict among circuits. But in the most recent case on the issue, the Ninth Circuit specifically noted that its view was in conflict with that of the Second Circuit. *Blackie* v. *Barrack,* ..... F. 2d

....., CCH Fed. Sec. L. Rptr. ¶95,312, at pp. 98,576-98,578 (9th Cir. September 25, 1975). The Ninth Circuit stated: "We are asked, the issue being novel in this circuit, to adopt the Second Circuit's position. We decline to do so . . . ." *Id.* 98,576-98,577. The court referred to "our disagreement with the Second Circuit rule." *Id.*, n. 8. After discussing the Second Circuit rule, the Ninth Circuit concluded: "With deference, we disagree. . . . It strikes us that the Second Circuit rule is the product of three policy considerations, urged on us here as well, which we conclude are insufficient . . . ." *Id.* 98,578.

The conflict among circuits involves (1) the rule of five circuits that a class action certification order is *never* appealable as a final judgment and (2) the rule of the Second Circuit that such an order is *sometimes* so appealable.[1] The conflict involves an extremely important question of federal appellate jurisdiction which cries out for resolution by the Supreme Court of the United States. The problem will not disappear; it can only be resolved by this Court. With seven Circuits now having ruled on the point and with more than a dozen recent opinions on the books, the question is clearly ripe for resolution.

[1] The Tenth Circuit may have adopted the Second Circuit rule in *Seiffer* v. *Topsy's International, Inc.*, 520 F. 795, 798 (10th Cir. 1975) (dismissing appeal after holding that case did not meet the three-pronged test used by the Second Circuit), bringing to seven the number of circuits that have ruled on the instant issue.

II.

THE EIGHTH CIRCUIT COULD READILY DETERMINE THE INSTANT CLASS ACTION ISSUES WITHOUT CONSIDERING THE MERITS.

Under the Second Circuit rule which petitioners urge this Court to adopt, only *some* class action certifications are appealable as final collateral judgments. For one thing, a ruling must be "separable from the merits" of the case in order to be appealable under the Second Circuit rule. There are at least two such issues in this case: (a) whether the instant Robinson-Patman claim can be maintained as a class action; and (b) whether a terminated dealer can represent a class including present dealers of the same manufacturer.

A. The Robinson-Patman Class Action Issue.

The only precedent allowing a class action in a Robinson-Patman Act case is *Gold Strike Stamp Co.* v. *Christensen*, 436 F. 2d 791 (10th Cir. 1970). This case has never been followed and was cogently criticized in Note, "Class Actions Under the Robinson-Patman Act: *Gold Strike* May Be Only Iron Pyrite," 25 Stan. L. Rev. 764 (1973). Respondents state at p. 7 of their Response that *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973) and *Bel Air Markets* v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972) "expressly acknowledge" the *Gold Strike* case. In fact, *Bel Air* distinguished *Gold Strike*, 55 F.R.D. at 542, and effectively confined the case to its peculiar facts. *Id.* The *Albertson's* case took the same approach, terming the *Gold Strike* situation "unique," 62 F.R.D. at 55. *Albertson's* was then affirmed by the same Court of Appeals that authored *Gold Strike*. 503 F. 2d 459 (10th Cir. 1974). The Tenth Circuit in *Albertson's* found

itself "in general agreement with the trial court's line of reasoning." *Id.* 464.

Aside from the dubious *Gold Strike* opinion, court after court in Robinson-Patman cases have held class actions inappropriate because of the individual issues necessarily involved. A Robinson-Patman claimant must allege and prove that he personally is in competition with an allegedly favored purchaser. That individual issue makes class action treatment unsuitable. *Bel Air Markets, supra*; *Shaw* v. *Mobil Oil Co.*, 60 F.R.D. 566 (D. N.H. 1973); *Gulf Wandes Corp.* v. *General Electric Co.*, 62 F.R.D. 377 (E.D. La. 1974). See also *Hettinger* v. *Glass Specialty Co.*, 59 F.R.D. 286 (N.D. Ill. 1973). As to each allegedly actionable sale, a claimant must show that his goods were of "like grade and quality" with those involved in the allegedly discriminatory sale. That issue also involves detailed and highly individualized proof which make a class action inappropriate. *Gulf Wandes, supra*; *Hettinger, supra.* These and other inherently individual issues so dominate Robinson-Patman cases as to present insuperable barriers to class treatment. All of these problems are apparent from the face of a Robinson-Patman complaint; they do not ordinarily require an examination of the "merits" of the case.

If the precedents are followed, the instant class action would be disallowed without any need for an examination of the merits of any of respondents' allegations. Whether to follow those precedents is of course a question for the Eighth Circuit, not for this Court. For purposes of the present Petition, it is enough to note that the Robinson-Patman class action issue presents a general question of law wholly separable from the merits of the allegations in this case.

B. Terminated Dealer Class Action Issue.

Another problem common to Robinson-Patman cases is that the members of the alleged class are generally competitors with each other. For this reason, Robinson-Patman actions frequently generate antagonisms and conflicts of interest which preclude a class action.[2] Although these conflicts take various forms, the most intense and serious conflict arises when a terminated dealer tries to represent current dealers in a Robinson-Patman case. No court has ever allowed such a case to proceed on a class basis.

The existence of such a conflict is generally apparent simply from viewing the complaint. However, even if the parties present evidence to show the exact nature and extent of a potential conflict, the record on that matter will have nothing to do with the merits of the case.

Many courts have held that it violates due process to permit a terminated dealer to represent a class of present dealers. If those courts are correct, the constitutional violation involved is consummated before verdict. A post-verdict appeal cannot correct it. The Eighth Circuit rule (which is also the majority rule) precludes effective review of such threats to due process. That is a significant enough problem to warrant review by this Court.

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2 See, *e.g.*, *J.W.T., Inc.* v. *Seagram & Sons, Inc.* 63 F.R.D. 139 (N.D. Ill. 1974), *Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973), and *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd.*, 503 F. 2d 459 (10th Cir. 1974), all cited in the Petition at pp. 7-8, n. 3.

CONCLUSION

For the reasons stated in our Petition for Writ of Certiorari and amplified herein, we respectfully urge this Court to grant the Petition in order to review the important question of federal appellate jurisdiction that has resulted in conflicting opinions among seven circuits.

Respectfully submitted,

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Subsequent to the filing of the certiorari petition in the instant case, two other certiorari petitions were filed raising exactly the same issue: *Topsy's International, Inc. et al.* v. *Seiffer,* No. 75-574 (from the Tenth Circuit) and *Touche Ross & Co., et al.* v. *Fabrikant et al.,* No. 75-537 (from the Ninth Circuit). We file this petition for rehearing because,

if either of the above certiorari petitions are granted, we would respectfully urge the Court to grant the instant petition also and perhaps to consolidate the cases for further proceedings. The question involved in all these cases is a frequently recurring question of federal appellate practice which can only be resolved by the Court and which will necessarily result in numerous appeals and certiorari petitions until it is finally resolved.

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